UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM, INC.; and PHILLIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

MEMORANDUM OF REILLY TAR & CHEMICAL CORPORATION ON THE ISSUE OF WHETHER THE UNITED STATES AND THE STATE OF MINNESOTA ARE ENTITLED TO RECOVER LITIGATION EXPENSES

I. INTRODUCTION

Plaintiff United States and plaintiff State of Minnesota are seeking to recover their attorneys' fees and other litigation expenses incurred in the above-captioned action. Those plaintiffs are also seeking to be reimbursed for past cleanup and remedial costs incurred by them. This memorandum shall not address that second category of expenses. Rather, it will examine the legal authority pertinent to the question of whether these plaintiffs are entitled to recover attorneys' fees and other litigation expenses.

II. DISCUSSION

A party may not recover attorneys' fees unless that remedy is explicitly provided for either by contract or by statute. Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 262 (1975); United States v. M/V Zoe Colocotroni, 602 F.2d 12, 14-15 (1st Cir. 1979) (the First Circuit held that the United States cannot recover attorneys' fees under the Federal Water Pollution Control Act because such fees are not expressly provided for in that Act). This proposition of law is known as the American rule. Id.

A. The United States' Claim for Attorneys' Fees

The United States is basing its claim for attorneys' fees on statutory provisions contained in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601, et seq. As shall be seen, the language on

which the United States relies is anything but straight-forward and totally unlike statutory provisions which provide for attorneys' fees in other federal acts.

CERCLA simply does not authorize the recovery of attorneys' fees in an action for response costs under § 107 of CERCLA. Typically, a statute allowing a prevailing party to recover attorneys' fees includes a provision expressly authorizing that recovery. In fact, in the list of twenty environmental protection statutes authorizing recovery of attorneys' fees set forth in Derfner and Wolf, Court Awarded Attorneys Fees, § 33.01 et seq. (1983), every one of those laws explicitly refers to "attorneys' fees" by name. CERCLA is not one of the statutes contained in the list. See id. for a discussion of federal statutes in all areas authorizing attorneys' fee awards.

In order even to find the language on which the United States pins its hopes for attorneys' fees, one must first participate in what amounts to a treasure hunt through CERCLA's provisions. The first stop is CERCLA § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), which states that responsible parties are liable for "all costs of removal or remedial action . . .." That sends one running to § 101(23), which defines "remove" or "removal" to mean, among other things, "action taken under § 9604(b) . . .." 42 U.S.C. § 9601(23). Hence, the hunt ends at § 104(b), 42 U.S.C. § 9604(b), in something of an anticlimax:

> Whenever the President is authorized to act pursuant to subsection (a) of this section . . . [he] may undertake such planning, legal, fiscal, economic, engineering, agricultural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter. [Emphasis supplied.]

As is apparent, the language of § 104(b) hardly constitutes the "specific and explicit provisions for the allowance of attorneys' fees" necessary to create an exception to the rule that attorneys' fees are not recoverable. See Alyeska, 421 U.S. at 260.

The absence of an explicit authorization for awarding attorneys' fees in the cost recovery provisions of § 107 of CERCLA strongly suggests that Congress did not intend to abrogate the general "American rule" and to allow plaintiffs to recover their attorneys' fees as part of their total cleanup costs. This suggestion becomes even stronger when § 110 of CERCLA is considered by contrast. Section 110 permits employees who are fired or otherwise discriminated against by their employers for providing information to the federal or state governments in a CERCLA action to seek relief from the Secretary of Labor. 42 U.S.C. § 9610. Subdivision (e) of § 110 provides that "[w]henever an order is issued under this section to abate such violation, at the request of the applicant a sum equal to the aggregate amount of all costs and expenses (including the attorneys' fees) determined by the Secretary of Labor to have been reasonably incurred by the applicant for, or in connection

with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation." 42 U.S.C. § 9610(e). The presence of this explicit authorization for the recovery of attorneys' fees in § 110, when contrasted with the absence of such language in § 107, shows that when Congress wanted to abrogate the American rule in the context of CERCLA, it knew how to--and did--use explicit language to do so. Indeed, Congress used such explicit language not once but twice in CERCLA itself; in § 112(c)(3) of CERCLA Congress once again used explicit language specifically authorizing the recovery of attorneys' fees for certain aspects of subrogation actions on behalf of the Superfund. See 42 U.S.C. § 9612(c)(3). This contrast in the statutory language chosen by Congress shows a lack of Congressional intent that any attorneys' fees could be awarded under the cost recovery provisions of § 107 of CERCLA.

To be sure, two courts have heretofore ruled that the language of § 104(b) of CERCLA provides for attorneys' fees. There is no indication, however, that either of those courts considered any of the above analysis, or were apprised of EPA's own internal interpretations of the awardability of litigation costs under § 104(b). In United States v. Northeastern Pharmaceutical & Chemical Co., 579 F. Supp. 823 (W.D. Mo. 1984), the court applied the right test--i.e., that under Alyeska attorneys' fees are not recoverable unless provided for by contract or statute. However, in spite of being armed with the correct rule,

the Northeastern court made an egregious call. The court simply mouthed the Alyeska rule, traced the circuitous statutory scheme of CERCLA, quoted the wholly ambiguous and nearly impenetrable language of § 104(b), and concluded, without further discussion, that the United States was entitled to recover attorneys' fees. 579 F. Supp. at 851. There is no mention of Congressional intent. There is no discussion of why the words in § 104(b) lead to the court's conclusion. There is no comparison of the language of § 104(b) with other, explicit language in CERCLA, e.g., § 110 or § 112, or with the language in other statutes which specifically provide for attorneys' fees. In short, there is no analysis.

The other case that held that CERCLA provides attorneys' fees is United States v. Cauffman, No. Cv. 83-6318 Kn (Bx) (C.D. Cal., Sept. 26, 1984). The court in Cauffman was even more conclusory than was the Northeastern court. In fact, the only authority cited in Cauffman is the Northeastern case.

In determining that CERCLA provides for the award of attorneys' fees, neither the Northeastern nor the Cauffman court discussed the EPA's own interpretation of § 104(b). (Indeed, there is no reason to think either of them were even aware of it.) In a July 20, 1984 memorandum from Lee A. DeHihns, III, Associate General Counsel of the Grants, Contracts, and General Law Division of the EPA, to Gene A. Lucero, Director of the Office of Waste Programs Enforcement for the EPA, the EPA's own Office of General Counsel concluded that the language of § 104(b) "does

not extend to litigation or other efforts to compel private party cleanups . . .." A copy of that memorandum is attached hereto as Exhibit A. The purpose of the memorandum was to determine whether costs incurred by states to compel responsible party cleanups are recoverable from Superfund. In answering that question, the EPA determined that costs for activities authorized by § 104(b) that support enforcement efforts are allowable. However, the EPA, emphasizing that § 104(b) deals with studies and investigations, concluded that § 104(b) does not authorize "litigation or other efforts to compel private party cleanups . . .." See Exhibit A at p. P-51. The EPA therefore refused to let Superfund money be used to pay for litigation expenses. The memorandum closes with the conclusion that payment of litigation costs "will require more explicit statutory authority than exists in § 104." Id.[1/]

1/ Indeed, the EPA's Office of Inspector General has applied an earlier version of that same interpretation to this very case. In a May 24, 1984 report to Lee M. Thomas, then EPA Assistant Administrator for Solid Waste and Emergency Response, concerning which previous expenditures of the State and the City were acceptable for federal Superfund credit in accordance with CERCLA § 104, the Office of the Inspector General stated the following:

> We are questioning $25,000 claimed for legal fees paid by the City. A January 21, 1983, memorandum from the Assistant Administrator for Solid Waste and Emergency Response established policy on the allowability of legal costs. This memorandum stated that specifically identified, site specific enforcement costs related to investigation and development of

The EPA memorandum, being an interpretation of a statute which the EPA is tasked to administer, should be afforded considerable, though not determinative, weight by a court in construing § 104(b). See Andrus v. Shell Oil Co., 446 U.S. 657, 667-68 (1980) (an administrative practice is accorded "peculiar weight" in construing a statute because "it involves a contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion"); United States v. NASD, 422 U.S. 694, 719 (1975) (the interpretation of an agency which administers an act, "while not controlling, is entitled to considerable weight"); Udall v. Tallman, 380 U.S. 1, 16 (1975) ("When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its

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1/ (continued)

> evidence, which are difficult to distinguish from other cleanup related costs, are allowable. Costs associated with the public function of law enforcement, such as court costs and payment of attorney fees, are not allowable.
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> The City retained a local law firm to represent them on day-to-day legal matters. During the credit period, the City paid the firm $64,564 for legal fees related to the Reilly Tar site. These billings were over and above the monthly retainer and represented special charges for representing the City in an action against Reilly Tar. The City based its $25,000 claim on an estimate and was not aware of the actual costs at the time the claim was submitted. Since the $25,000 claim represents attorney fees associated with litigation, the cost is not allowable.

administration"). Had the Northeastern court, which wrote his decision six months before the July EPA memorandum was written, and the Cauffman court been apprised of the EPA memorandum, in all probability they would have arrived at conclusions denying the award of attorneys' fees and litigation expenses to the United States under CERCLA.

B. The State of Minnesota's Claims for Attorneys' Fees

In 1973 the Minnesota legislature enacted sections 115.071(3)(a) and 115.072 of the Minnesota Statutes, which authorize the State to recover cleanup costs and attorneys' fees, respectively, incurred in cleaning up hazardous waste sites. In the present action, the State is seeking to rely on Minn. Stat. §§ 115.071(3)(a) and 115.072 to recover cleanup costs and attorneys' fees that it incurred after the legislature enacted those sections in 1973, even though those sections did not go into effect until after Reilly ceased operations at St. Louis Park in 1972. Pursuant to Judge Magnuson's Order of April 5, 1985, the State is now able to amend its Complaint to assert claims under the Minnesota Environmental Response and Liability Act ("MERLA") which provides for the award of attorneys' fees under M.S.A. § 115B.14. This memorandum shall discuss both of the State's asserted grounds for attorneys' fees.

1. Attorneys' Fees Under M.S.A. §§ 115.071(3)(a) and 115.072

Section 115.071(3)(a) provides that a court may order a defendant to:

> [F]orfeit and pay to the state a sum which will adequately compensate the state for the reasonable value of cleanup and other expenses directly resulting from unauthorized discharge of pollutants, whether or not accidental . . ..

Section 115.072 provides:

> In any action brought by the attorney general, in the name of the state, pursuant to the provisions of chapters 115 and 116, for civil penalties, injunctive relief, or in an action to compel compliance, if the state shall finally prevail, and if the proven violation was willful, the state, in addition to other penalties provided in this chapter, may be allowed an amount determined by the court to be the reasonable value of all or a part of the litigation expenses incurred by the state. In determining the amount of such litigation expenses to be allowed, the court shall give consideration to the economic circumstances of the defendant.

The first issue present here is whether Minn. Stat. §§ 115.071(3)(a) and 115.072 must be applied retroactively in order for the State to recover its cleanup costs and attorneys' fees under those statutes. Minnesota courts have defined a "retroactive" or "retrospective" law as follows:[2/]

> A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past. It may also be defined as one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued, or which relates

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2/ Courts generally use the words "retroactive" and "retrospective," as applied to laws, interchangeably. See 16A Am. Jur. 2d Constitutional Law, § 661 (1979).

> back to and gives to a previous transaction some different legal effect from that which it had under the law when it occurred. Another definition of a retrospective law is one intended to affect transactions which accrued, before it became operative, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence. [Emphasis in original, citation omitted.]

E.g., Cooper v. Watson, 290 Minn. 362, 187 N.W.2d 689, 693 (1971); Halper v. Halper, 348 N.W.2d 360 (Minn. App. 1984).

Applying Minn. Stat. §§ 115.071(3)(a) and 115.072 to the State's claims in this action is a retroactive application of those statutes. Reilly ceased operations in 1972, a year before the Minnesota legislature enacted §§ 115.071(3)(a) and 115.072. Therefore, it appears that the State, by relying on §§ 115.071(3)(a) and 115.072 to recover cleanup costs and attorneys' fees that it incurred beginning in 1973, is seeking to apply those sections to disposal activities by Reilly that were fully completed prior to enactment of those sections.

While there are no Minnesota cases or attorney general opinions directly construing Minn. Stat. §§ 115.071(3)(a) and 115.072, Minnesota law strongly disfavors retroactive legislation. Minnesota Statutes § 645.21 provides:

> No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.

In Muckler v. Buchl, 276 Minn. 490, 150 N.W.2d 689 (1967), the Minnesota Supreme Court held that a plaintiff's right to recover damages in a wrongful death case would be governed by the statute

in effect when the decedent died rather than the statute that the legislature enacted while the case was pending. The new statute increased the limit on the amount a plaintiff could recover from $25,000 to $35,000. Id. at 696-97. The court reasoned that application of the new statute to the plaintiff's claim would be a retroactive application of the statute that was contrary to the legislative intent. Id. On the basis of Muckler, it is the time that defendant completes his or her conduct, rather than the time which the plaintiff suffers his or her injury, that determines whether application of a statute is retroactive.[3/] Thus, in Muckler, even though wrongful death

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3/ There are federal court decisions involving the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., that support the view that the State is seeking a retroactive application of Minn. Stat. §§ 115.071(3)(a) and 115.072 in this case. In United States v. Northeastern Pharmaceutical & Chemical Company, Inc., 579 F. Supp. 823, 850-51 (W.D. Mo. 1984), and United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982), the courts held that § 7003 of RCRA did not impose liability on off-site generators of hazardous waste which was dumped into the sites in question prior to the enactment of RCRA. Although the Northeastern and Wade courts did not reach the broader question of whether § 7003 of RCRA could be applied to owners of the sites without constituting a retroactive application of the Act, both courts were skeptical of the "continuing violation" theory which holds that a threat of future leaks removes the retroactivity issue. See, e.g., United States v. Price, 523 F. Supp. 1055, 1071 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982).

Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(4), can also be relied on for assistance in construing Minn. Stat. §§ 115.071(3)(a) and 115.072. In fact, § 107 of CERCLA is probably more analogous to Minn. Stat. §§ 115.071(3)(a) and 115.072 than § 7003 of RCRA because § 107 of CERCLA authorizes recovery of cleanup costs, while § 7003

damages presumably are intended to compensate a plaintiff for future, as well as past, deprivations, and even though the trial was not reached until after the effective date of the legislation, the court held that the wrongful death legislation adopted during the pendency of the trial could not be applied to the plaintiff's claim. Such an application would constitute an impermissible retroactive application since the previous statute was in effect when the decedent was killed. Applying this law to the present matter, the State cannot recover cleanup costs and attorneys' fees that it incurred beginning in 1973 even though the damage to the environment continues at present because when Reilly ceased operations in 1972, Minn. Stat. §§ 115.071(3)(a) and 115.072 had not yet been enacted.

3/ (continued)

of RCRA authorizes injunctive relief against imminent environmental hazards. Several courts, including this one, which have considered the issue of whether imposing liability on a defendant for cleanup costs relating to dumping activities occurring before CERCLA's enactment requires retroactive application of § 107, have concluded that imposing liability for cleanup costs under § 107 did require a retroactive application of CERCLA. United States v. Reilly Tar & Chemical Corp., (Memorandum Order dated June 14, 1984) slip op. at 12-14; Northeastern, supra, 579 F. Supp. at 823; State ex rel. Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983). Research has revealed no decision in which a court applied § 107 of CERCLA to waste disposal activities occurring prior to the Act, while concluding that the application was not a retroactive one. The federal cases construing § 107 of CERCLA, therefore, support the view that Minn. Stat. §§ 115.071(3)(a) and 115.072 must be applied retroactively to grant the State the recovery it is seeking in this case.

In other cases, the Minnesota Supreme Court has uniformly ruled that statutes will not be applied retroactively unless there is a clear legislative intent directing such retroactive application. E.g., Parish v. Quie, 294 N.W.2d 317 (Minn. 1980); Mason v. Farmers Insurance Companies, 281 N.W.2d 344 (Minn. 1979); In re Breole's Estate, 298 Minn. 116, 212 N.W.2d 894 (1973); Ekstrom v. Harmon, 256 Minn. 166, 98 N.W.2d 241 (1959). Other jurisdictions also follow this rule. E.g., State ex rel. Brown v. Georgoff, 562 F. Supp. 1300 (D. Ohio 1983); People v. Castro, 114 Ill. App.3d 984, 449 N.E.2d 886 (1983); State v. Department of Industry, Labor and Human Relations, 101 Wis.2d 396, 304 N.W.2d 758 (1981); Coffman v. Coffman, 60 A.D.2d 181, 400 N.Y.S.2d 833 (1977).

Most jurisdictions, however, also recognize an exception to this general rule against retroactive application for remedial or procedural statutes. Therefore, in those jurisdictions, courts generally have held that legislation affecting the "remedies" available for violations of various rights or the "procedures" for enforcing such rights--as opposed to the "substantive law" creating those rights--will be applied retroactively to actions that arise prior to, but are pending at the time of, the enactment of that legislation. See Bradley v. School Board of the City of Richmond, 416 U.S. 696, 716-24 (1974) (plaintiff is entitled to recover attorneys' fees under federal statute enacted while appeal was pending); 16A Am. Jur. 2d Constitutional Law §§ 673-677

(1979). As discussed below, however, Minnesota courts to date have rejected this exception permitting retroactive application of remedial or procedural legislation.

Section 645.21 of the Minnesota Statutes provides:

> No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.

Similarly, Minn. Stat. § 645.31(i) provides:

> When a section or part of a law is amended, the amendment shall be construed as merging into the original law, becoming a part thereof, and replacing the part amended, and the remainder of the original enactment and the amendment shall be read together and viewed as one act passed at one time; but the portions of the law which were not altered by the amendment shall be construed as effective from the time of their first enactment, and the new provisions shall be construed as effective only from the date when the amendment became effective. When an act has been amended 'so as to read as follows,' or otherwise, a later reference to that act either by its original title or as it exists in any compilation of the laws of this state includes the act as amended. [Emphasis added.]

Based on the foregoing statutory provisions, Minnesota courts have regularly held that in the absence of clear and manifest legislative intent to apply a statute retroactively, legislation only can be applied prospectively to actions arising subsequent to the enactment of that legislation. E.g., Calder v. City of Crystal, 318 N.W.2d 838 (1982); Mason v. Farmers Insurance Companies, supra, 281 N.W.2d at 344; Brugger v. Brugger, 303 Minn. 488, 229 N.W.2d 131 (1975); Halper v. Halper, 348 N.W.2d 360 (Minn. App. 1984).

Moreover, the relevant case law shows that the Minnesota Supreme Court has expressly considered, and rejected, the retroactivity exceptions for remedial and procedural legislation that many other jurisdictions have adopted. For example, Minnesota decisions repeatedly have held that the presumptions against retroactive application contained in Minn. Stat. §§ 645.21 and 645.31 apply to statutes affecting both "substantive" and "procedural" rights. E.g., In re Murphy's Estate v. State Department of Public Welfare, 295 Minn. 298, 198 N.W.2d 570 (1972); Cooper v. Watson, supra, 187 N.W.2d at 690; Ekstrom v. Harman, supra, 98 N.W.2d at 242; Marsolex v. Miller Waste Mills, 244 Minn. 55, 69 N.W.2d 617, 620 (1955); Chapman v. Davis, 233 Minn. 62, 45 N.W.2d 822, 824 (1951).

Additionally, Minnesota decisions have not recognized an exception to the general rule against retroactive legislation for "remedial" statutes. In Muckler v. Buchl, 276 Minn. 490, 150 N.W.2d 689, 697 (1967), the Minnesota Supreme Court refused to apply retroactively a remedial statute that increased the ceiling on the amount of damages recoverable under the state wrongful death statute. The Muckler court, relying on Minn. Stat. § 645.21, held that the plaintiff's recovery would be governed by the wrongful death statute in effect when the decedent died, which set a $25,000 limitation on damages, rather than the statute enacted while the case was pending, which allowed damages up to $35,000. Id. Similarly, in In re Murphy's Estate

v. State Department of Public Welfare, supra, 198 N.W.2d at 575-76, the Minnesota Supreme Court rejected the plaintiff's claim that a statutory amendment that permitted the state to recover increased hospital care costs from mental health patients in state hospitals should receive retroactive application. The court stated "this [rule that statutes should not be applied retroactively absent legislative intent to do so] is particularly true if any remedial change enlarges the state's scope of recovery."

The word "remedial," when used in the context of retroactive application of legislation, generally means the remedy afforded by that legislation. 16A Am. Jur. 2d Constitutional Law § 675 (1979). The Muckler and Murphy's Estate cases above concerned remedial legislation in this sense. The phrase "remedial legislation," however, also is frequently used to describe legislation that is designed to enhance social welfare. In In re Breole's Estate, supra, 212 N.W.2d at 894, the Minnesota Supreme Court faced a retroactivity question with respect to a statute that was "remedial" in the social welfare sense. The Court held that despite the fact that the statute in question, which increased the rights of illegitimate children, was remedial in nature and the fact that the statute was enacted prior to the entry of a distribution decree, that statute could not be applied to permit the plaintiff to inherit from his father who had died before enactment of the legislation. Id. at 895-96.

The Court, relying on Minn. Stat. § 645.21, ruled that the plaintiff was seeking a retroactive application of the statute, and that such an application was impermissible because there was no clear and manifest legislative intent permitting it. Id.

The foregoing cases establish that Minnesota strongly disfavors retroactive application of legislation. Research has revealed no cases in which a court even suggested that an exception to the general rule against retroactive application absent clear legislative intent should be created, even in unusual or rare circumstances, for remedial or procedural legislation. Accordingly, the only basis on which Minn. Stat. §§ 115.071(3)(a) and 115.072 can be applied retroactively is if there is a sufficient indication of legislative intent authorizing retroactive application.

The question then becomes what is a sufficient showing that the legislature intended that a statute be applied retroactively. Section 645.21 of the Minnesota Statutes requires that the legislative intent be "clear" and "manifest." Moreover, in Parish v. Quie, 294 N.W.2d 317, 318 (Minn. 1980), the Minnesota Supreme Court stated that to meet the requirements of Minn. Stat. § 645.21, the legislative intent to authorize retroactive application must be "shown on the face of the statute." In some older cases, the Minnesota Supreme Court indicated that the legislative

intention to make a statute retroactive either must be expressly declared in the statute or must appear by unavoidable implication. See Brown v. Hughes, 89 Minn. 150, 94 N.W. 438 (1903); Parkinson v. Brandenburgh, 35 Minn. 294, 28 N.W. 919 (1886); Giles v. Giles, 22 Minn. 348 (1876). Research has failed to locate any cases in which a Minnesota court held that legislative history is applicable to determine whether the legislature intended to make a law apply retroactively.

Under these strict standards concerning legislative intent, Minn. Stat. §§ 115.071(3)(a) and 115.072 cannot be applied retroactively. In the two cases in which the Minnesota Supreme Court found that legislation should be applied retroactively, the statutes in question explicitly stated that they "shall operate not only prospectively but retroactively." Asch v. Housing and Redevelopment Authority of the City of St. Paul, 256 Minn. 146, 97 N.W.2d 656, 662 (1959); Holen v. Metropolitan Airports Commission, 250 Minn. 130, 84 N.W.2d 282 (1957). In contrast, in this case Minn. Stat. §§ 115.071(3)(a) and 115.072 contain no language--either explicit or implicit--indicating a legislative intent that they should be applied retroactively.

Accordingly, Minn. Stat. §§ 115.071(3)(a) and 115.072 cannot be applied retroactively under current Minnesota law because there is no legislative intent authorizing the retroactive application. Therefore, the State may not rely on those

statutes as a basis for recovering its attorneys' fees in this action.[4/]

2. Attorneys' Fees Under MERLA

It is anticipated that the State will soon be serving an Amended Complaint containing claims under MERLA. Section 14 of MERLA, M.S.A. § 115B.14, provides that "a court may award reasonable attorney fees" to the prevailing party. This provision raises two questions: (1) what will the State have to prove to become a prevailing party, and (2) attorneys' fees generated during what time period are recoverable?

In order for the State to prevail in this action, it must prove that the response costs which it has incurred were both "reasonable and necessary." See M.S.A. § 115B.04 subd. 1(a). To the extent which the response costs incurred by the State are determined by the Court to be either unreasonable or unnecessary, the State cannot be considered a prevailing party for purposes of being awarded attorneys' fees.

4/ Even if a court were to find that these statutes could be applied to the facts of this case, the State would still not be awarded attorneys' fees unless it could prove that Reilly's "proven violation was willful." See M.S.A. § 115.072. In a Minnesota state court case dealing with a creosote wood-treatment facility, the court determined that the state was not entitled to an award of attorneys' fees under M.S.A. § 115.072 because the conduct of the defendant was not willful. See In re Litigation Involving Boise Cascade Corp., No. B-46882, slip. op. at 20 (Anoka Co. D.C. Dec. 28, 1984).

Even if the State is permitted to recover attorneys' fees under § 14 of MERLA, those fees must be limited to fees generated after the MERLA action has been brought. The language of the statute itself suggests that attorneys' fees may be recovered only for "an action under sections 115B.01 to 115B.15." Since the State has yet to bring an action under any of those sections, it may not recover any attorneys' fees that have been generated to date. When and if the State serves Reilly with its Amended Complaint, the Court may consider that portion of the State's attorneys' fees which are thereinafter expended on MERLA issues to be recoverable under § 14.

Moreover, § 14 provides that a court "may" award attorneys' fees to a prevailing party. Under the words of the statute, the Court has discretion in deciding whether or not to award any attorneys' fees at all. The Court may ultimately want to review the entire course of these proceedings in exercising that discretion, including the fact that (1) the State intervened as a plaintiff in an action brought by the United States, (2) the powers given to the United States under CERCLA and RCRA are broad enough to permit the relief prayed for, without invoking MERLA, (3) the extent to which attorneys' fees are incurred on the common law claims and defenses rather than on statutory claims, and (4) the fact that Reilly offered a responsible solution to the St. Louis Park problem two years before MERLA was invoked. Given the complexity of this case,

the novelty of the issues presented, the lateness of bringing a MERLA claim and the close balance of the equities between the parties, it would be entirely appropriate for the Court to decline awarding attorneys' fees to the State and to award them to Reilly instead.

III. CONCLUSION

For the reasons stated above, neither the United States nor the State of Minnesota may recover attorneys' fees under CERCLA. In addition, the State of Minnesota may not recover attorneys' fees under Minn. Stat. §§ 115.071(3)(a) and 115.072. Only if the State can demonstrate that it is a prevailing party which has met its burdens of proof under MERLA is the State entitled to have the Court even consider whether attorneys' fees should be awarded. If, after reviewing the entirety of the case, the Court determines that the State is entitled to attorneys' fees under MERLA, the only fees which the State will be entitled to recover will be those fees generated after the service of the Amended Complaint stating the MERLA count.

Dated: April 9, 1985.

Respectfully submitted,

DORSEY & WHITNEY

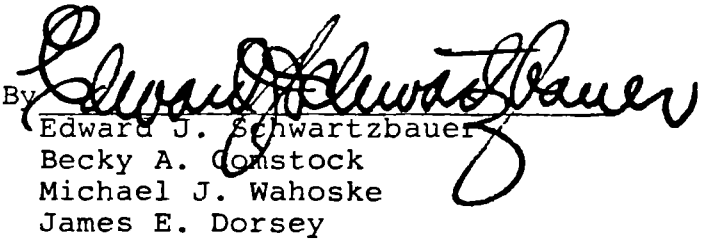
By 
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EXHIBIT A

JUL 20 1984

OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Gene A. Lucero, Director
Office of Waste Programs Enforcement

FROM: Lee A. DeHihns, III
Associate General Counsel
Grants, Contracts, and General
Law Division

SUBJECT: Authority To Use CERCLA to Provide Enforcement Funding Assistance to States

This responds to your request for our opinion as to whether costs incurred by states to compel responsible party cleanups and to monitor and report to the public on such cleanups are payable from the Hazardous Substance Response Trust Fund ("Superfund"). It is our view that these state enforcement costs are not allowable; but costs for activities authorized by section 104(b) that support enforcement efforts are allowable.

Discussion

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) authorizes payment of the costs of a "program to identify, investigate, and take enforcement and abatement action against releases of a hazardous substance." §111(c)(3). We have earlier advised */ that this authority is not restricted to the payment of federal enforcement costs.

Section 111(a) sets out the authorized uses of Superfund as: governmental response costs under section 104, response claims, natural resources damage claims, the costs specified in section 111(c), and necessary administrative expenses. However, section 111 is not authority for payment of these costs when incurred by states or local governments. The only authority in

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*/ Memorandum entitled "Superfund Cost Issues" dated September 22, 1981, from Gerald Yamada, Acting Associate General Counsel, to Bill Sullivan, Deputy Associate Administrator for Enforcement Policy.

CERCLA to award assistance to states and local governments is section 104(d)(1). Consequently, only those state costs that can be viewed as "response" costs under section 104 are payable from Superfund.

Section 104(d)(1) provides that:

> Where the President determines that a state or political subdivision thereof has the capability to carry out any or all of the actions authorized in this section, the President may . . . enter into a contract or cooperative agreement with such state or political subdivision to take such actions in accordance with the criteria and priorities established pursuant to section 105(8) of this title and to be reimbursed for the reasonable response costs thereof from the Fund . . . .

Under this authority, EPA may enter into an agreement providing funds for a state (or its political subdivision) to undertake a response action in accordance with criteria used to develop the National Priorities List (NPL) pursuant to section 105(8) of CERCLA. The NPL establishes priorities among sites of releases or threatened releases based on their relative risk of danger to the public health or welfare or to the environment. Consequently, remedial action agreements are limited by the statute to actions at NPL sites. Similarly, risk-related criteria must be used "to the extent practicable, taking into account the potential urgency of such action, for the purpose of taking removal action." §105(8)(A). Thus, any agreement under section 104(d)(1) must be for a site-specific response.

A response is either a removal or a remedy. §101(25). A removal means:

> the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of a release . . ., such actions as may be necessary to monitor, assess, and evaluate the release . . ., the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release . . . . §101(23)

A remedy consists of:

> those actions consistent with permanent remedy . . . to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public welfare or the environment . . . . §101(24)

For a state to be awarded funds for enforcement actions against those responsible for releases of hazardous substances, to monitor private party cleanups, or to conduct community relations activities related to such cleanups, these actions must come within the meaning of "response." Certain activities that would support an enforcement effort are clearly within the purview of section 104. There is, for example, broad authority for studies, investigations, and other information gathering:

> to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances . . . involved, and the extent of danger to the public health or welfare or to the environment . . . (and to) plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this Act. §104(b)

This, section authorizes studies and investigations to identify responsible parties, to determine the extent and nature of the problem and the risk it presents, and to determine the appropriate remedy (i.e., RI/FS activities). These studies and investigations are necessary for the government to initiate either a Superfund-financed cleanup or an enforcement action. However, section 104(b) deals only with studies, investigations and information collection; the issue remains as to whether the costs of administrative proceedings or litigation to compel private cleanups, the monitoring of such private efforts, and community relations activities to inform the public regarding these private actions can be viewed as "response."

In support of the interpretation that enforcement efforts are "response" actions, it could be argued that such efforts are included within the meaning of section 104(a)(1). This section authorizes the President to:

> act, consistent with the national contingency plan, to remove or arrange for the removal of and provide for remedial action . . . or take any other response measure . . . to protect the public health or welfare or the environment, unless the President determines that such

> removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

If Congress intended that the first recourse in the event of a release was to the responsible party, then Congress arguably must also have meant enforcement actions to be among the responses available to the government under section 104. This approach would necessarily focus on the general language in the definitions of removal and remedy to the exclusion of the examples cited therein.

While it may be possible to make this argument and interpret "response" to include state enforcement actions, it is our view that it is a difficult argument to make and that a better interpretation is that section 104(a)(1) stops short of authorizing Superfund to be used to support such state enforcement efforts. Such a reading of the term "response" is too broad. The intent of section 104 is to support governmental efforts to identify problems associated with a particular release, determine the appropriate action, and carry out that action. This seems clear from the action examples cited in sections 101(23) and (24) in defining "response."

It is our view that Congress did not intend a private party cleanup to be included in the definition of a "response" under section 104. We conclude that state activities paid from the Superfund must be carried out under section 104(d)(1). Accordingly, the Superfund eligibility of state enforcement costs is limited to those activities authorized by section 104(b). Section 104(b) authority does not extend to litigation or other efforts to compel private party cleanups, or to monitoring or community relations activities associated with such cleanups. Payment of these state enforcement-related costs will require more explicit statutory authority than exists in section 104.

*U.S. GOVERNMENT PRINTING OFFICE: 1985-451-821/20034